

Appeal from a decision of the Fairbanks District Office, Bureau of Land Management, rejecting an amendment to Native allotment application F-14769.

Set aside and referred for hearing.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

Where a Native allotment applicant alleges that he timely made an application for an allotment of a specific parcel of land with officials of the Bureau of Indian Affairs but, through no fault of his own, this parcel was not included within the application which the Bureau of Indian Affairs filed with the Bureau of Land Management, the applicant will be afforded a fact-finding hearing in which he may attempt to show that he did, in fact, make timely application for the parcel in question.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

Under sec. 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. | 1634(c) (1982), an amendment to a Native allotment application may be filed only where the applicant is seeking land different from the land described in the original application. No amendment may be allowed under that section where the applicant is seeking land in addition to that described in the original application.

APPEARANCES: Judith K. Bush, Esq., Anchorage, Alaska, for appellant; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

William Carlo, Jr., has appealed from a decision of the Fairbanks District Office, Bureau of Land Management (BLM), rejecting an amendment to his Native allotment application F 14769.

On appeal, Carlo asserts that on December 10, 1971, he signed a Native allotment application form which left blank the descriptions of the land sought with the understanding that the Bureau of Indian Affairs (BIA) would fill in the descriptions of a 50- and 110-acre parcel respectively. On December 16, 1971, BIA filed appellant's Native allotment application and evidence of use and occupancy with BLM pursuant to the provisions of the Native Allotment Act of May 17, 1906, 43 U.S.C. | 270-1 (1970), which was subsequently repealed with a savings provision for applications then pending by section 18 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. | 1617 (1982).

As filed, the application sought an allotment for a parcel of approximately 50 acres of unsurveyed land located along the edge of the Tanana White Alice Site road. The application did not contain a description of a second parcel (parcel B) which now forms the subject of appellant's appeal before this Board.

On April 25, 1977, BLM notified appellant that BLM's field examiners would be in the Tanana area from May 17 to June 23, 1977, to examine Native allotments and advised appellant that "it is very important that you or someone who knows your land be available during that time to go with the land examiners."

On June 11, 1977, the BLM field examiner accompanied by appellant examined the subject 50-acre tract to verify use and occupancy. The field examiner's report contained in the record reflected a map of the property and the various elements evidencing use and occupancy. Based on the information collected, including evidence that appellant had used the land for his home and his subsistence, the examiner concluded that "appellant complied with the Native act." The field examiner's report made no mention of a second tract nor was the second tract depicted on the map drawn in hand by the field examiner.

On May 31, 1983, Tanana Chiefs Conference transmitted a memorandum to BIA, based on an affidavit received from appellant, requesting certification or amendment of appellant's application to include a second parcel denominated as parcel B. Thereafter, on June 22, 1983, BLM received a transmittal letter from BIA enclosing appellant's affidavit. In his affidavit, Carlo averred:

I applied for two parcels one is 50 acres on the White Alice Rd. behind Tanana. The other is for 110 acres in the SW<sup>1</sup> of section 25, T. 13 N., R. 11 W., F. M. See attached map. The second parcel is apparently lost since it doesn't appear on BLM records. I applied for both places at the same time.

BIA stated that its files did not substantiate Carlo's claim that he applied for two tracts at the time of his original application, but did note:

The Tanana Chiefs Conference Realty Officer interviewed and obtained the affidavit from Mr. Carlo. The report of

investigation indicates that this a very common occurrence or problem among the thousands of applications submitted during the "Rush of 71."

Due to changes in personnel, purging/transfers of records, and changes in policy, it would be next to impossible to locate the original application and the individual who accepted the original. There is currently nothing in our files to substantiate Mr. Carlo's statement. Therefore I can only request that Mr. Carlo's claim be honored and be given a field test to determine its validity.

By decision dated April 15, 1986, BLM held that appellant's Native allotment application for the 50-acre tract, subject to a reservation of coal, had been legislatively approved and dismissed a protest filed by the State of Alaska as to that parcel. <sup>1/</sup> BLM also denied appellant's request to amend his application to include parcel B, stating:

Departmental Regulation 43 CFR 2561.1(a) states that applications for allotment properly and completely executed on a form approved by the Director, Bureau of Land Management, must be filed in the proper office which has jurisdiction over the lands. An Alaska Native Allotment application is deemed pending before the Department of the Interior if it was filed in any bureau, division, or agency of the Department on or before December 18, 1971. Evidence of pendency before the Department on or before December 18, 1971, shall be satisfied by any bureau, division, or agency time stamp or by an affidavit of any bureau, division, agency officer that the application was received on or before December 18, 1971. See Ouzinkie Native Corporation v. Edward N. Opheim, 83 IBLA 225 October 19, 1984. The memorandum from BIA did not include a proper and complete application on an approved form and there is nothing to substantiate that the application was pending on or before December 18, 1971. Therefore, the request for an amended application is hereby denied.

By notice dated May 12, 1986, appellant appealed the adverse decision of BLM denying his request to amend his application to include parcel B.

On appeal, Carlo argues that he had a pending allotment application on December 18, 1981, and it is only the incompleteness of the application that is at issue on appeal. He has submitted a more detailed affidavit with his statement of reasons (SOR), in which he sets forth the circumstances surrounding the filing of his application. That affidavit provides in pertinent part:

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<sup>1/</sup> On June 1, 1981, the State of Alaska had protested approval of the allotment on the ground that the land described in appellant's allotment application was then being used for an existing trail for which there was no reasonable alternative for access because the trail was an existing constructed public access road, transportation facility, or corridor. BLM

3. When I applied for my lands, I applied for two (2) parcels of land. Parcel A is located on the White Alice Site road at Tanana, Alaska, and is for 50 acres of land. What should be parcel B is located in T. 13 N., R. 10 [sic] W., Sec. 25, F.M. and is for 110 acres. This is a little north of the Yukon river pipeline crossing and set back and across the road from the Native Allotment of Edward Mayo, Jr.

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5. The Bureau of Land Management does not understand that because a paper is lost that it could have existed. I applied for parcel B at the Arctic Bowl building where the BIA was then. It was in the winter of 1971 and I was working up on the slope. I had come into town and decided that while I was here I should go over and apply for my lands. I remember exactly who took my application. Her name was Kathy Adams. I would still know her if I saw her. I have been told that she now works for the State of Alaska in their land Department. I have also been told by the BIA, TCC and ALSC that the former Ms. Adams will not do an affidavit on my behalf or anyone elses. I remember signing the forms for the parcels and showing Kathy Adams where my parcels were located. She was going to fill in the description part of the application for me, because it had to be in metes and bounds and I didn't know how to do this. I remember showing her the location on two maps. I believe that one of the maps was on the wall for some reason.

6. I picked the location for parcel B because I had camped there for several years before. I was using that area for trapping and camping. I wanted to camp away from the river where it wasn't so windy. Other members of my family were down on the river near this place. I also picked a place in Tanana for my home. I had two other fish camps near Tanana but I thought that I would always have the use of those places or the fish camps of my family. I wanted my trapping area and camp. I knew I could apply for 160 acres of land and did so. It would not have made sense to only apply for 50 acres, since I had used more than 160 acres to begin with. I think that most Native people use more than 160 acres. It is a matter of picking the place that is most important to you as a Native Allotment. I knew that the Land Claims was going to go through and thought that my other places would be protected by that. That my village would have land forever and for my kids, so I didn't worry about picking something closer to Tanana or my fishing camps. I thought they would be available for my use anyway.

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fn. 1 (continued)

dismissed this protest in its decision dated Apr. 15, 1986, on the ground that alternative access to the site in question was available. No appeal was taken from the denial of this protest.

7. I first thought something was wrong a couple of years after the pipeline started. I wasn't contacted about my land, but this wasn't unusual for the pipeline or BLM, so I just waited. Then BLM came out to field examine my land, but they only field examined my parcel A and not parcel B. I wanted to know why and asked about it. The BLM said they didn't know about it. I went out to the BLM and tried to find out something, but they didn't have any information and I believe they said I would have to go to BIA. I couldn't believe that they had only 50 acres on my records. All this time I had been using my land and had thought that it was on the record at the BLM and the BIA. I was under the impression that I had that land. I know that I am not the only person who has had trouble with the Bureau of Indian Affairs losing their Native Allotment applications or their map and getting less than they applied for in the first place. I had hoped that I would be treated fairly. There were a lot of people who had their applications lost by other people and as far as I know the BLM has taken their word for the loss. I don't feel like I am any different from them, except that BIA took my application, and the person who took it won't come forward and say she did. I'm not saying she lost the application or map. I realize there were a lot of people applying at the last minute, but those of us who have had our applications incorrectly submitted to BLM by BIA should not be unjustly treated for their mistake. They are supposed to protect our lands and our interests.

Appellant contends that Board precedents have long recognized that Native allotment applicants filed applications with BIA which left land descriptions blank for BIA officials to fill in with accurate descriptions. Eleanor H. Wood, 46 IBLA 373 (1980); William Yurioff, 43 IBLA 14 (1979). Due to unforeseen circumstances, Carlo contends that the allotment application transmitted to BLM failed to contain the description for parcel B. Based on various Board decisions, including Nora L. Sanford (On Reconsideration), 63 IBLA 335, 337 (1982), Eleanor H. Wood, *supra*, and William Yurioff, *supra*, appellant submits he should be given an opportunity to submit a reconstructed or amended application to BLM for parcel B (Appellant's SOR at 4-5).

Alternatively, appellant argues section 905(c) of the Alaska Native Interest Lands Conservation Act (ANILCA) permits him to now amend his application to describe the land originally intended to be claimed (Appellant's SOR at 5-7).

Appellant also urges that, as an unnamed class member in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), he may not be arbitrarily deprived of an allotment of land and that due process requires that he be afforded a hearing. The Board, appellant contends, has consistently recognized that a right to a hearing applies where questions arise concerning the timely filing of an application. See Nora L. Sanford (On Reconsideration), *supra*; Eleanor H. Wood, *supra*. As in Sanford, appellant admits that there is no document showing timely receipt by BIA or any other agency within the Department of a Native allotment application embracing the parcel now

sought. Nonetheless, appellant claims he is entitled to a hearing in order to present proof to the trier of fact that he filed an application for parcel B prior to December 18, 1971 (Appellant's SOR at 7-10). Nora L. Sanford (On Reconsideration), *supra*.

[1] We do not agree with appellant's contention that the Yurioff, Sanford, and Wood cases are necessarily dispositive of the instant case. Factually, this case is distinguishable from these decisions because the record here is devoid of any corroborating affidavits or statements from BIA affirmatively indicating that appellant's application was on file with BIA on or before December 18, 1971.

The record in Sanford reflected that not only had Sanford filed her own affidavit but a statement from BIA was included therewith, which specifically stated that it was attributable to BIA's error that a missing parcel was not included in Sanford's original application. In Yurioff, appellant Yurioff filed his own affidavit and a statement from BIA that his application had been filed with BIA on a specific date, which date was prior to December 18, 1971. Similarly, in Wood, Wood's affidavit was accompanied by the affidavit of a BIA representative who stated that Wood's application was on file as of December 18, 1971.

Thus, in the Sanford, Wood, and Yurioff cases, this Board found corroborating evidence in the records which raised factual issues regarding the pendency of applications on or before December 18, 1971, and, on this basis, directed BLM to initiate a Government contest so that factual issues could be resolved at a hearing. In the instant case, except for appellant's affidavit, there is nothing in the record corroborating appellant's contention that it was his original intention to include parcel B in his Native allotment application. BIA's own statement that it would be impossible to determine who accepted appellant's original application is refuted by appellant's affidavit naming Kathy Adams as the individual who took his application.

The narrow issue presented in this case is whether this Board is required to grant a hearing based on Pence v. Kleppe where the only proof offered to substantiate appellant's claim of timely application consists of appellant's own uncorroborated affidavits.

In this regard, we must conclude that, while the absence of any independent corroboration clearly weakens the evidentiary weight which may be accorded appellant's assertions, this does not work to alter the essential fact that appellant has, indeed, challenged factual predicates essential to the determination of BLM that Parcel B may not be allowed. We believe that it is precisely this type of question which, under the dictates of Pence v. Kleppe, *supra*, requires a fact-finding hearing in which appellant may be afforded an opportunity to establish that he did, indeed, timely make application for Parcel B with officials of BIA. Accordingly, we will refer this matter for a hearing in accordance with Pence v. Kleppe, *supra*. See Stephen Northway, 96 IBLA 301 (1987). Appellant bears the burden to prove by a preponderance of the evidence the timely filing of his application on or before December 18, 1971.

[2] Appellant also argues, in the alternative, that he should be permitted to amend his application pursuant to section 905(c) of ANILCA, 43 U.S.C. | 1634(c) (1982). Under the facts disclosed in the present case, however, section 905(c) is not applicable.

Section 905(c) provides, inter alia: "An allotment applicant may amend the land description contained in his or her application if said description designates land other than that which the applicant intended to claim at the time of the application and if the description as amended describes the land originally intended to be claimed." By its clear language, this provision is only applicable where the original description designates lands other than the land originally sought. As we have noted, "it does not permit the applicant to include other land in addition to that originally described." Charlie R. Biederman, 61 IBLA 189, 192 n.1 (1982) (emphasis in original). Indeed, section 905(c) expressly provides that "[i]f the allotment application is amended, this section shall operate to approve the application or to require its adjudication, as the case may be, with reference to the amended description only." (Emphasis added.)

Appellant does not contend that the description of the land in his application as filed is erroneous. On the contrary, he actively maintains that that description is correct. What he contends is that he also made application for an additional parcel, which parcel, through no fault of his own, was omitted from the application that was filed with BLM. This, however, is not the type of amendment contemplated by section 905(c). See generally, Olympic v. United States, 615 F. Supp. 990 (D. Alaska 1985).

We have already ruled above that appellant is entitled to a hearing to show that he did make a timely application for the land now denominated as Parcel B. If appellant prevails at such a hearing, he would necessarily be entitled to consideration of his application for that parcel since that application would have been timely made. If, however, it is established that appellant did not timely file an application for that parcel, he would not be able to avail himself of the provisions of section 905(c) and argue that he intended to apply for the land even if he did not, in fact, make a timely application therefor.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case referred to the Hearings Division for further proceedings consistent with this decision.

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James L. Burski  
Administrative Judge

I concur:

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John H. Kelly  
Administrative Judge